Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

James Shaw, Petitioner

v.

United States of America

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

I. WHETHER UNITED STATES v. VILLMONTE-MARQUEZ, ___ U.S. ___, 103 S.CT. 2573 (1983) AND TITLE 19 U.S.C. § 1581 (a) AUTHORIZE THE BOARDING OF A VESSEL IN AN INLAND WATERWAY, WHERE CUSTOMS OFFICERS KNEW PRIOR TO THE BOARDING THAT THE VESSEL HAD NOT BEEN ON THE OPEN SEAS OR A THREAT TO THE INTEGRITY OF THE UNITED STATES BORDERS?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No.

JAMES SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

James Shaw, the Petitioner herein, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, (App. A, infra) an unpublished opinion, was rendered on May 22, 1984, and the denial of rehearing and rehearing en banc (App. B, infra) was rendered on June 29, 1984.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1984, after a timely suggestion for rehearing en banc was denied on June 29, 1984 (App. C, infra). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Petition involves the following Constitutional provision:

a. Fourth Amendment, United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

This Petition involves the following statute: Title 19 U.S.C. § 1581 (a):

> "Customs officers. Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters or, as he may be authorized, within a customs-enforcement area established under the Anti-Smuggling Act, or at any other authorized place without as well as within his district and examine the manifest and other documents an d papers and examine, inspect and search the vessel or vehicle and every part thereof and any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance."

STATEMENT

On September 3, 1982, a one count indictment was returned in the United States District Court for the Southern District of Florida, charing the Petitioner with knowing possession of a firearm in violation of 26 U.S.C. § § 5861 (d) and 5871.

After being indicted, Petitioner filed a Motion to Suppress, requesting that all evidence seized at the time of his arrest be suppressed because an unlawful boarding

and search by customs officers. This request was denied after an evidentiary hearing. The trial court found that the petitioner had consented to the boarding and search.

At the hearing on the motion to suppress the following facts were elicited. Early in the morning of August 13, 1982, Customs Patrol Officer Peter Doimeadios and Border Patrol Officer James Epperly were patrolling by automobile, an area called Baker's Haulover near Miami, Florida. They saw Petitioner and three other men launch a 23-foot open boat into the water from a trailer pulled by a truck. Doimeadios decided to check the boat's documentation. He admitted that he had no suspicion of any illegal activity by Shaw. (S. 16-17, 23).

Doimeadios met Shaw on the dock, identified himself, and asked Shaw if he owned the boat. Shaw replied that he was the owner. Doimeadios then inquired if he could inspect the vessel's documents. Walking toward the boat, Doimeadios asked if there were any weapons on board. Shaw indicated that he

had a pistol and a rifle. Doimeadios told Show not to touch the weapons until he boarded the boat. (S. 17, 23, 36-39, 50-51).

Once aboard the boat, Doimeadios asked Shaw if he could see the weapons. Shaw removed the padlock, opened the door of the boat's console and removed the guns. They were in zippered cases. Doimeadios took the weapons out of their cases and examined them. He noticed that the rifle had three selector positions. In response to a question by Doimeadios, Shaw denied the weapon was fully automatic. Shaw was arrested after Special Agent John Vecchia of the Bureau of Alcohol, Tobacco and Firearms tested the weapon and determined that it was fully automatic. (S. 24-29, 63-64).

After a jury trial in Case No. 82-475-Cr-WMH, the Petitioner was convicted of knowing possession of a firearm in violation of 26 U.S.C. § § 5861 (d) and 5871.

The United States Court of Appeals for the Eleventh Circuit provided Petitioner with

no relief. The court concluded that the boarding was justified under the authority of 19 U.S.C. § 1581 (a) and this Court's decision in United States v. Villamonte-Marquez, __ U.S. ___ 103 S.Ct. 2573 (1983), which upheld a warrantless inspection of documents without articulable suspicion, of a "vessel ... located in water providing ready access to the open seas". Id. at ___ U.S. ___, 103 S.Ct. at 2575.

REASONS FOR GRANTING THE WRIT

I. This case presents the issue of whether customs officers are permitted to board and search a vessel docked in inland waterways pursuant to 19 U.S.C. § 1581 (d), knowing that the vessel had not previously been on the open sea. It is a question whose answer should be without doubt, "No".

In United States v. Villamonte-Marquez, __ U.S. __, 103 S.Ct. 2573 (1983), this Court interpreted 19 U.S.C. § 1581 (d) to authorize customs officers to board and inspect without warrant or reasonable suspicion of a customs violation, a vessel in waters providing ready access to the open seas. It is more than abundantly clear that protecting the integrity of the United States' borders from the illegal importation of prohibited substances, goods and individuals were the primary concerns of the Court when this opinion was rendered. The same concern existed when the customs officers in Villamonte-Marquez, supra, observed the foreign vessel, HENRY MORGAN, anchored in the Calcasieu River Channel.

Prior to boarding the vessel, the officers had no knowledge as to where the sailboat had been before it dropped anchor.

The object behind the decision in Villamonte-Marquez, supra, was the creation of the least intrusive method to enable customs officers to conduct documentation checks of vessels which might have come from the open seas. In reaching the decision, this Court rejected the application of United States v. Brignoni-Ponce, 422 U.S. 873 (1973)(roving police stops absent reasonable suspicion); and United States v. Martinez-Fuerte, 428 U.S. 543 (1976)(fixed checkpoints) because of the factual differences between vessels located in waterways offering ready access to the open seas and automobiles in principal roadways in border areas. The decision points out that customs officials do not have the means to spot all vesselswhich might come from the open seas and herd them into fixed checkpoints. The possibility is great that vessels with access to the open seas may never come into harbor and in that manner

avoid customs authorities. ___ U.S. ___, 103 S.Ct. at 2580.

In the instant case, the trial court disregarded the fact that the customs officers knew with certainty that the Petitioner's boat had not previously been on the open seas on the date of the boarding. The court of appeals in its summation of the facts stated that Customs Officer Doimeadios and Border Patrol Epperly "saw Shaw and three other men launch a 23-foot open boat into the water from a trailer being pulled by a truck". (App. A, supra). The officers' knowledge of the boat's origin distinguishes this case from that of Villamonte-Marquez, supra, and sets it apart from the class of vessels with which this Court was concerned in that case.

The Court of Appeals for the Eleventh Circuit also relied on United States v. Albano, 722 F.2d 690 (11th Cir. 1984) and United States v. Alonso, 673 F.2d 334 (11th Cir. 1982) to reach the conclusion that the boarding was lawful. In both Albano, supra, and Alonso, supra, customs officers conducted documentation checks of vessels which might

have come from the open seas. In fact, in Alonso, supra, the stopped vessel had been observed by customs officers as it approached the United States in a northerly direction from a point five to six miles off the coast.

The decision in the instant case over-extends customs boarding authority pursuant to 19 U.S.C. § 1581 (a) as construed by this Court. Instead of examining whether the Petitioner's boat had been on the open seas or otherwise posed a threat to this nation's borders, the court applied a literal translation of 19 U.S. C. § 1581 (a); that vessels with ready access to the open seas can be boarded without warrant or suspicion by customs officers. This interpretation of the statute is rigid, unacceptable and does not comport with the Fourth Amendment. The effect of the Eleventh Circuit's holding is to give customs officers unbridled discretion to board vessels at any time and at any place. Pursuant to this decision, a houseboat located on a canal, a boat in dry dock or a boat docked in an intra-coastal marina could be indiscriminately boarded.

The decision in Villamonte-Marquez, supra, provides that "no act of Congress can authorize a violation of the Constitution." ___ U.S. ___ 103 S.Ct. at 2578. No reason exists to permit the customs boarding of a boat docked in an inland waterway where officers have observed the boat being placed in the water from a trailer. Indeed, this is not the typical case where officers observe a vessel approaching the coast or where a boat is observed docked in an inland waterway after it had not been observed previously. In the present case, the officer watched for several minutes as the Petitioner removed the boat from an automobile trailer and placed it in the water adjacent to the dock. This Court could not have intended to give customs officers limitless authority to conduct documentation boardings of all vessels in all locations.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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Telephone: 522-3307 (305)

August, 1984.

By: _____
JAMES M. STARK, P.A.

APPENDIX

Appendix A.	Opinion of the Court of Appeals.
Appendix B.	Denial of Rehearing and Rehearing En Banc
Appendix C.	Judgment of the Court of Appeals.
Appendix D.	Trial Court's Findings of Fact and Order on Motion to Suppress.

CERTIFICATE OF SERVICE

I, JAMES M. STARK, a member in good standing of the Bar of this Honorable Court, certify that I have served all parties to this proceeding by first class mail, postage prepaid, with a copy of the Petition for Certiorari, a Certificate of Service and a Notice of Appearance this 23 day of August, 1984. The parties who were served and their addresses are:

1. United States of America
   The Honorable Rex E. Lee
   Solicitor General
   Department of Justice
   Washington, D.C. 20530

2. Robert Dunlap, Esq.
   Asst. U. S. Attorney
   U. S. Attorney's Office
   155 So. Miami Avenue
   Miami, Florida 33130

JAMES M. STARK, P.A.

By: _____
JAMES M. STARK, P.A.

United States of America,
Plaintiff-Appellee,

vs.

James Shaw,
Defendant-Appellant.

No. 83-5078.

In the United States Court of Appeals
for the Eleventh Circuit

(May 22, 1984)

Per Curiam:

DO NOT PUBLISH

James Shaw appeals his conviction in the United States District Court for the Southern District of Florida, for the possession of an unregistered automatic weapon, in violation of 28 U.S.C. § § 5861 (d) and 5871. He assigns as error the district court's denial of his motion to suppress evidence and the court's instructions to the jury. Finding no reversible error, we affirm.

Early in the morning of August 13, 1982, Customs Patrol Officer Peter Doimeadios and Border Patrol Officer James Epperly were patrolling by automobile an area called Baker's Haulover near Miami, Florida. They saw Shaw

and three other men launch a 23-foot open boat into the water from a trailer. Doimeadios decided to check the boat's documentation. He admits that he had no suspicion of any illegal activity by Shaw.

Doimeadios met Shaw on the dock, identified himself, and asked Shaw if he owned the boat. Shaw replied that he was the owner. Doimeadios then inquired if he could inspect the vessel's documents. Walking toward the boat, Doimeadios asked if there were any weapons on board. Shaw indicated that he had a pistol and a rifle. Doimeadios told Shaw not to touch the weapons until he boarded the boat.

Once aboard the boat, Doimeadios asked Shaw if he could see the weapons. Shaw removed a padlock, opened the door of the boat's center console, and removed the guns. They were in zippered cases. Doimeadios took the weapons out of their cases and examined them. He noticed that the rifle had three selector positions. In response to a question by Doimeadios, Shaw denied the rifle was fully automatic.

Shaw was arrested after Special Agent John Vecchia of the Bureau of Alcohol, Tobacco and Firearms tested the weapon and determined that it was fully automatic.

Shaw initially challenges the constitutionality of the boarding of the boat by Doimeadios.[1/] We hold that the board was justified as a documentary check under the authority of 19 U.S.C. § 1581(a).[2/] The United States Supreme Court

---

1/ After a hearing on Shaw's motion to suppress the rifle, the district court held that he had consented to the search. Because of our resolution of this issue, we need not reach the question of consent.

2/ Any officer of the customs may at any time go on board of any vessel ... at any place in the United States or examine the manifest and other documents and papers and examine, inspect, and search the vessel ... and every part thereof and any person, trunk, package, or cargo on board ... and use all necessary force to compel compliance.

19 U.S.C. § 1581 (a). Shaw maintains that the boarding could not constitute a request to examine documents because he had shown the papers to Doimeadios on the dock before he inquired about the weapons. Admittedly, Epperly's testimony at the hearing on the motion to suppress supports that version of the events. Record, Volume II at 49-50,54-55. Yet, both Doimeadios and Shaw stated that Doimeadios did not see the boat's papers until after he was on board. Id. at 23, 63, 65.

recently addressed the constitutionality of a search made pursuant to this statute in United States v. Villamonte-Marquez, ___ U.S. ___, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983). The Court upheld a warrantless inspection of documents, without articulable suspicion, of "a vessel ... located in waters providing ready access to the open seas." Id. at ___, 103 S.Ct. at 2575, 77 L.Ed.2d at 26. Baker's Haulover, where Shaw's boat was docked, permits such ready access to the Atlantic Ocean.[3/] A boat cannot travel directly from Baker's Haulover to the ocean. [4/] This court, however,

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3/ Doimeadios testified that Baker's Haulover Is "next to a cut that comes from the open water into the bay." Record, Volume II at 30.

4/ On cross-examination Doimeadios was asked:

> Q. But you don't immediately leave Baker's Haulover area and go right out into the Atlantic Ocean do you?
>
> A. No.
>
> Q. You have to go into the Intracoastal Waterway and down the Intracoastal Waterway in either direction and either go out Port Everglades or the Baker's Haulover cut. Is that correct?
>
> A. Yes.

Record, Volume II at 31.

applied Villamonte-Marquez to the inspection of documents of a boat on the Crooked River in Georgia, which, like Baker's Haulover, is closely connected to the Atlantic Ocean by the intracoastal waterway. United States v. Albano, 722 F.2d 690, 692 n.1, 694-95 (11th Cir. 1984). See also United States v. Alonso, 673 F.2d 334, 336 (11th Cir. 1982) (documentary stops without suspicion in customs waters are constitutional).

Doimeadios' inquiry concerning the presence of weapons on board and the examination of the guns were legitimate safety procedures. In United States v. Alfrey, 620 F.2d 551 (5th Cir.), cert. denied, 449 U.S. 938, 101 S.Ct. 337, 66 L.Ed.2d 160 (1980),[5/] customs officers boarded a ship for a documents search under 19 U.S.C. § 1581 (a) and observed a small boat speeding away. The officers asked if those leaving possessed any weapons and

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5/ In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

conducted a limited search to account for the location of all the persons on the ship. The court upheld the search as "a justified safety precaution." Id. at 555. "The rationale permitting such an inspection is to insure the safety of the officers as they go about their duties." United States v. Kent, 691 F.2d 1376, 1382 (11th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983). The same reasoning applies in this case. Under these facts, as a valid safety measure, Doimeadios was justified in asking about and securing the weapons. The district court correctly denied Shaw's motion to suppress.

Shaw also contends that the district court misstated the government's burden of proof in its instructions presumed an element of the crime - that the rifle in evidence was an automatic weapon - and thus obviated the necessity of proving that fact. Examining the instructions as a whole, we believe that the district court sufficiently informed the jury of its duty to find that the rifle was an automatic weapon as defined by the statute

before it could return a guilty verdict.

After reading the definition of an automatic weapon, the district court stated,

> (w)hat must be proved beyond a reasonable doubt is that the defendant (sic) knowingly possessed the item as charged.
>
> In this case that would mean that the defendant knowingly possessed a firearm which is Government's Exhibit 2 in this case. That such item, such firearm was a firearm as defined, as I have already defined in these instructions, and that it was not then registered to the defendant ...

Record, Volume III at 170.

The judgment of the district court is

A F F I R M E D.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 83-5078

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES SHAW,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion May 22, 11 Cir., 1984, ___ F.2d___).

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges.

PER CURIAM:

(XX) The Petition for Rehearing in DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor or it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/signed/
United States Circuit Judge

REHG-6
(Rev. 6/82)

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-5078

D.C. Docket No. 82-00475-Cr-WMH

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES SHAW,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before GODBOLD, Chief Judge, TJOFLAT and HENDERSON, Circuit Judges

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of conviction of the said District Court in this cause be and the same is hereby, AFFIRMED.

Entered: May 22, 1984

For the Court: Spencer D. Mercer, Clerk

By: /signed/

ISSUED AS MANDATE: JUL 13 1984

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
JAMES SHAW,	)	
	)	CASE NO:
Defendant.	)	82-475-Cr-WMH
	)	

Miami, Florida
November 4, 1982
3:00 o'clock P.M.

The above entitled matter came on for Jury Trial before the Honorable DONALD PORTER, United States District Judge, pursuant to notice.

APPEARANCES:

For the Government: ROBERT DUNLAP, ASSISTANT UNITED STATES ATTORNEY

For the Defendant: JAMES M. STARK, ESQ.

(In chambers)

THE COURT: Well, now, the reason that I asked you to, along with the defendant, to meet in Court chambers, is that I did want to supply for the record the reasons for my entry of the order that I entered denying the motion to suppress in the nature of my findings and conclusions.

And I will just read that into the record. That's really the purpose of this.

I am advised that the Deputy Clerk is engaged in certain things as you well know that are required. We are going to call 35 panel members up all at once.

Now, I considered the issue raised on the motion to suppess. I have really decided it on the basis that I have found and concluded that, considering all the surrounding facts and circumstances, the totality of the circumstances and what occurred, that the search was not unreasonable under the Fourth Amendment, but moreover, there was an implied consent to the search.

So that I find, in other words, that was a consentual search.

Now, some of the things that I think are significant are, first of all, that -- this won't be in any necessarily logical order but there are certain things that I have taken into account that I wish to mention. This occurred at the time that, as I understand it, the 23-foot inboard, open top -- what is that called?

MR. STARK: Open fisherman, Your Honor.

THE COURT: Open fisherman vessel had been offloaded from the trailer and into the water at -- I don't know that I have the name of the --

MR. STARK: At Bakers Haulover.

THE COURT: Well, the record sufficiently will identify it beyond that.

Now, at that time, as I understand it, the Customs agent -- I won't, maybe, given the names, but there was a border patrol agent and a customs agent, but as I understand it the Customs agent was not in uniform.

At this time it's about 8:00 o'clock in the morning. Defendant is accompanied by three other males. And then at the point, while the Customs agent was standing on shore and I believe the defendant was also on shore, the agent asked the defendant who was the owner of the boat, and the defendant responded that he was.

At that point the agent -- the Customs agent then asked the defendant to produce the papers for the boat. I can't recall whether

defendant answered specifically, but I view the evidence as indicating that the defendant not only did not refuse, but started towards the boat. Either that or there was a further conversation.

But at any rate, the defendant indicated that he intended to comply with the request that he produce the boat papers.

Now, in that regard, there wasn't anything wrong with the boat papers, at least nothing as indicated at the hearing. So, it's recognized in the law, Fourth Amendment discussions of consentual searches, that there are instances in which the Court may consider whether or not the defendant may have been willing to do a certain thing because he considered it to his benefit.

In this case, since the papers were clear, apparently, why, there was no prejudice to be suffered by the defendant, and I take into account that defendant could well have considered that it would assist his situation if he did produce the papers. At any rate, he didn't give any indication that he wasn't going to.

But then before the Customs agent was -- I find this in the Customs agent's testimony -- before he was onboard the boat, he asked of the defendant if he had any guns on board. And I believe the Customs agent testified that he got a response, before either of them were on the boat, that, yes, he did have guns on board. And the Cusotms agent then said that he wanted to see them.

Whereupon the defendant turned and boarded the boat, and the Customs agent said, because, as the Customs agent testified, that he thought the defendant was getting a little ahead of him, he said, I don't want you to touch them until I see them.

Now, up to that point, the Customs agent was not on board the ship, and I don't consider that it's unreasonable at all to ask who owns the boat, and to ask under these circumstances.

Now, there's one officer there in plain clothes, the Customs agent. The Customs agent said the border patrolman remained in the car. I think the border patrolman may or may not have indicated otherwise, but, at any rate, I

find no situation where there are a number of police with drawn weapons. I find no instance that it's something that is occurring at night; all of that considering on whether the defendant's consent was overborne, was coerced, that's really the issue before me.

And I find also that no firearms were displayed. I recall testimony that defendant said that he thought the Customs agent was carrying a side arm because he thought he saw the outline of it under his shirt, that at least, apparently, it wasn't strapped on. It's for certain that it was not taken out of the holster if in fact the Customs agent did have a side arm.

Now, at that point the Customs agent does step on the boat and board it, and follows the defendant up to the console. This is a 23-foot boat so I suppose that wouldn't take very long to get to the console.

I take into account also that when they reached the console the defendant was the one who lifted off the unlocked padlock, but nonetheless, the object which was holding the

console door is closed, and he lifted that off and opened the doors and said something to the effect of I believe the defendant said this, there they are.

Now, I'm also entitled to consider, or I guess I understand I'm entitled to consider what a reasonable officer in the position of the Customs agent wouldhave understood from everything that occurred up to that time.

Well, I conclude that from everything that occurred up to that time, he would have concluded that the defendant had no objection to displaying the firearm nor to his boarding the boat.

I do take this into account, perhaps in several respects. I will mention it now. That the defendant, as I believe he testified on cross examination, was an officer of the Miami Police Force for nine years, a city police force, a far cry from deputy sheriff in a little county in a thinly populated state.

There isn't any direct evidence as to the extent of the training of the defendant as a police officer but I think that the nine years

of service is long enough for me to take into consideration that not only defendant was aware of his right to refuse to consent, but also was -- I think the word used by LaFave, or maybe other writers, is -- was, when you consider all the types of people that could be involved in this, defendant was a sophisticated person.

I could reasonably conclude that nine years of service in the Police Force in the City of Miami, defendant has been in many tight situations, dangerous situations to him, and thus would be less likely to have his will overborne by what was occurring up to that time, then would be others that might be imagined.

I do not intend to review a list of examples but I regard him in that way.

Now, there is something here, too. The Customs agent testified that defendant told him it has something to do with the notches or I think the ultimate effect of what it is that the defendant told him that it was equipped so that it would not fire automatically.

Now, after examining it, the Customs agent determined, in his opinion, it was a fully automatic weapon.

Although the defendant wasn't specifically asked about this, I consider his testimony in two aspects. Number one, with his experience as a nine-year Miami Police Officer, I think he would know the difference between an automatic weapon and a semi-automatic weapon -- rifle. Therefore, if he told the Customs officer what the Customs officer said, the defendant did not give a truthful answer to the Customs officer, which would be one thing I would consider on defendant's overall credibility.

On the other hand, if the defendant did in fact tell the Customs officer that it was a two-notch situation -- I will have to refer to the record for a more clear explanation of my statement in that regard, that is, refer to the transcript of the testimony -- that would mean that defendant believed that it was a semi-automatic weapon.

Now, in that event, it could be inferred

that defendant was perfectly willing to display the weapon to the Customs officer because it was not an illegal weapon because I don't understand it to be illegal, at least a violation of this statute that's in the indictment here, to possess a semi-automatic weapon.

Now, either way, I take that it really -- it either reflects on defendant's credibility or it gives an additional reason why it would support a conclusion that defendant's consent was voluntary because he thought that disclosure would help him and that he would not be implicated by revealing the rifle to the Customs officer.

Now, there are several other things that I should mention, that before boarding the vessel -- well, along that line, I guess, too, the defendant answered apparently immediately when asked if there were guns on board, he answered immediately that there were. He didn't give a non-responsive reply or say nothing. This I guess would be further support that he did not consider that advising the agent of that fact would implicate him

even if they were examined by the Customs agent.

And it's also some evidence, that just one piece out of 50, that the Customs agent would consider the fact that there had been a prompt reply, that the Customs agent would consider in drawing the reasonable conclusion that defendant had no objection to his going on board and looking at the weapons.

After all, when we think about it, the weapons, once you get into it, it's not practical under the situation there for the Customs agent to ask the defendant to bring the weapons to the dock side, for various obvious reasons, and I don't place any great weight on that point, but I note it.

Now, also the inquiry about the guns did alert the defendant to exactly what it was, plus the papers, did alert the defendant to exactly what it was that the Customs agent was interested in, so it doesn't come into those type of cases where either what they are really looking for is not revealed, that is, we are talking about this indictment for us now or other situations than this.

All of this occurred on the part of the alerting of the defendant and his prompt answer to the fact that there were guns on board. All of that occurred before the agent boarded the vessel.

I don't consider, really, that the inquiry about the ownership of the vessel or whether the officer could see the papers, I don't see how that was in this case prejudicial to the defendant and I really have to think much more -- well, I feel that the case gets significantly more important once the agent steps on board the vessel.

Obviously, if he had not done so, why, there would not be any search nor any seizure.

I do take into account that the Fourth Amendment proscribes only unreasonable searches and that reasonableness is to be assessed in terms of the circumstances as they reasonably appear to the police at the time of the search.

Defendant was not in custody at any time during this incident, until after the alleged machine gun had been discovered and identified,

apparently by the Customs agent. In fact, I don't think the evidence before me on this motion ever did really specifically say when if at all defendant was taken into custody, but he was not in custody at the time of the production of the firearms to the Customs agent. The Customs agent did not conceal his identity. Defendant knew that he was or claimed to be a Customs agent very soon after they met.

The Customs officer did testify that he said don't touch the weapons until I get there.

Now, in terms of the totality of the circumstances and reasonableness once, as I conclude, that at that time the Customs agent was proceeding reasonably on the basis that up to that time his actions were consented to by the defendant, I don't think it's unreasonable for him to request the defendant not to do anything with the firearms because of the fact that -- because they were firearms, because they have a tremendous potential of danger if they were to be suddenly used wrongly.

It's for the protection of the officer and that's not unreasonable.

I find, overall, no show of force, that is, show of force other than the request by the Customs agent, but show of force in terms of any other coercive surroundings.

I don't know what the weather was like at 8:00 A.M. that day, but it was in August. It may very well have been a beautiful morning. I don't have any evidence that it wasn't.

But it's a boat, it's not in a jail, it's not in a number of other situations that could be far more coercive. There was no forcible entry. It really involved -- the only entry by the Customs agent simply involved his stepping from the dock to the deck of the vessel, following the defendant to the console and the defendant then taking the lock off without having to unlock it, and opening the doors.

There was no interrogation involved other than what I have already referred to. And also, the whole incident didn't involve a long time. It wasn't something where the defendant was in custody for a while or where

he was detained and kept waiting while various things went on. I don't know that there is a precise statement in the record but from my own understanding of the testimony that I heard, it would be that the whole incident didn't take over 10 or 15 minutes.

I think that that states the facts that I have considered and the conclusions that I have drawn which led me to reach the ultimate result that the motion to suppress be denied.

Thank you very much.

Now, that's all the proceedings on that.

(Whereupon, the commencement of the voir dire followed, which has not been transcribed.)

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DADE) SS.

I, SYLVIA SEYMOUR, Official Court Reporter, do hereby certify that the foregoing transcript, pages 1 through and including 12, is a true and correct transcription of stenographic notes of the proceedings before the Honorable DONALD PORTER, United States District Judge, at the time and place hereinabove set forth.

DATED at Miami, Dade County, Florida, this 25th day of February, 1983.

/signed/

Office - Supreme Court, U.S.
FILED
OCT 26 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-347

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES SHAW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a Customs officer lacked authority to board his vessel while it was located in an inland waterway.

1. After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of possessing an unregistered automatic weapon, in violation of 26 U.S.C. 5861(d) and 5871. He was sentenced to three months' imprisonment. The court of appeals affirmed (Pet. App. A13-A19).

a. The evidence at trial, which is not in dispute, showed that petitioner, a former Miami police officer, possessed a fully automatic rifle on board his 23-foot open boat. That weapon was not registered with the Department of the Treasury as required by federal law.

On the morning of August 13, 1982, Customs Patrol Officer Doimeadios and Border Patrol Officer Epperly were patrolling by car an area near Miami known as Baker's Haulover. At about 8:00, they saw petitioner and several other men launch a 23-foot boat into the water from a trailer (Pet. App. A13-A14, D25). Officer Doimeadios decided to check the boat's documentation. Doimeadios met petitioner on the dock, identified himself, and learned that petitioner owned the boat. Doimeadios then asked if he could check the boat's documents, and petitioner began to walk toward the boat (*id.* at A14, D25-D26). Doimeadios followed and asked whether there were any weapons on board. Petitioner said he had a pistol and a rifle. Because petitioner was several steps ahead of him, Doimeadios told petitioner not to touch the weapons until Doimeadios had boarded the boat (*id.* at A14, D27).

After Doimeadios was aboard, he asked petitioner if he could see the weapons. Petitioner removed an open lock from the boat's center console and withdrew the guns. Each was in a zippered case. Doimeadios removed the guns from their cases and examined them. He saw that the rifle had three selector positions, but petitioner denied that it was an automatic weapon. Petitioner was arrested after testing of the rifle showed that it was fully automatic (*id.* at A14-A15, D28-D29).

b. Prior to trial, petitioner moved to suppress the rifle, contending that the Customs officer lacked authority to board his boat. The district court denied his motion. That court found that petitioner had consented both to the boarding and the search that revealed the guns (*id.* at D23-D37). The court of appeals affirmed but did not reach the issue of consent. Relying on this Court's decision in *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), the court of appeals concluded that Officer Doimeadios had authority under 19 U.S.C. 1581 to board

petitioner's boat. The court held that *Villamonte-Marquez's* reasoning applied to the instant case because the waters of Baker's Haulover, where petitioner's boat was located, provided ready access to the sea via the Intracoastal Waterway (Pet. App. A15-A17 & n.4).

2. In *Villamonte-Marquez*, this Court held that Customs officers acting pursuant to 19 U.S.C. 1581(a) may board vessels in inland waters and conduct documentation checks without having a reasonable suspicion of a violation of law. Petitioner contends (Pet. 6-10), however, that *Villamonte-Marquez* does not apply in this case because the officers had just observed the boat being launched and therefore "knew with certainty that the * * * boat had not previously been on the open seas on the date of the boarding" (Pet. 8). Petitioner argues (Pet. 7) (emphasis in original) that "[t]he object behind the decision in *Villamonte-Marquez, supra,* was the creation of the least intrusive method to enable customs officers to conduct documentation checks of vessels which *might* have come from the open seas."

There is of course no doubt that Section 1581(a) expressly authorizes a nonconsensual boarding in the circumstances of this case. Moreover, there is no suggestion in *Villamonte-Marquez* that boardings and document checks are constitutionally permissible only if the officers have cause to believe that the vessel recently visited international or foreign waters. And contrary to petitioner's contention, controlling the entry of persons and goods into this country was not the sole governmental interest found to justify such boardings and inspections. The Court noted (slip op. 12) that the documentation laws, which 19 U.S.C. 1581 helps to enforce, serve many other important purposes, such as the "regulation of participation in certain trades," "enforcement of various environmental laws," monitoring exports, and "ensuring safety on American waterways." These interests justify suspicionless boardings and document checks

whether or not the vessel has recently visited international or foreign waters, a practice that has been authorized by Congress since the earliest days of the Republic.

In *Villamonte-Marquez*, the Court did note (slip op. 12) that the need for boardings and document checks is greatest in those inland waters with ready access to the open sea. As the court of appeals noted, however, the boarding in this case did take place in just such a spot. Other cases have sanctioned suspiciousless boardings in similar locations. See *United States* v. *Bain*, 736 F.2d 1480, 1487-1488 (11th Cir. 1984) (boat stationary in Miami harbor); *United States* v. *Albano*, 722 F.2d 690, 692-693 & n.1 (11th Cir. 1984) (sailboat observed at anchor in river leading to Intracoastal Waterway).[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1984

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[1]We also note that the district court found that petitioner had consented to the boarding here as well as to the Customs officer's request to see petitioner's weapons (see Pet. App. D23-D37). The court of appeals did not reach the propriety of the district court's ruling (*id.* at A15 n.1), and petitioner does not contest it here. It thus would appear that there is an independent basis, aside from the issue petitioner raises, for concluding that the boarding and search did not infringe petitioner's Fourth Amendment rights.

DOJ-1984-10